

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Qwest's Wholesale Service
Quality Standards

ISSUE DATE: September 11, 2006

DOCKET NO. P-421/AM-00-849

ORDER RELEASING ESCROW FUNDS
AND REQUIRING CONTINUED
REPORTING

PROCEDURAL HISTORY

On August 18, 2005, the Minnesota Supreme Court upheld in part and reversed in part the Commission's ORDER ADOPTING WHOLESALE SERVICE QUALITY STANDARDS (July 3, 2003).¹

On December 16, 2005, Qwest Corporation (Qwest) stated how it proposed to implement the Commission's Order as interpreted by the Court. The Commission invited comments on Qwest's proposal, among other things.

On June 30, 2006, the Commission received comments from Eschelon Telecom, Inc. (Eschelon); Qwest; and a coalition of competitive local exchange carriers (CLECs) consisting of Integra Telecom of Minnesota, Inc.; McLeodUSA Telecommunications Services, Inc.; NorthStar Access, LLC; Otter Tail Telecom, Inc.; POPP.com, Inc.; TDS Metrocom; and XO Communications of Minnesota, Inc. (collectively, the CLEC Coalition).

By July 21, 2006, the Commission had received reply comments from Eschelon and Qwest.

On July 31, 2006, Qwest filed additional comments, and subsequently filed attachments to those comments that Qwest had inadvertently omitted.

On August 17, 2006, this matter came before the Commission.

¹ *In the Matter of Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

State and federal law requires incumbent telephone companies to sell their services at wholesale prices for competitors to resell to retail customers.² In addition, incumbents must rent the use of “unbundled network elements” (UNEs) at wholesale prices for competitors to use in providing retail services.³ Incumbents and competitors set forth the terms of these transactions in their “interconnection agreements.” These new laws have triggered concerns about the quality of the services and elements that incumbents are required to provide. Of the many efforts to address these concerns, two remain relevant to the current case.

- *Performance Assurance Plan.* In order to secure regulatory approval to offer long-distance interLATA telecommunications,⁴ Qwest offered CLECs the option of incorporating a “Performance Assurance Plan” (PAP) into their interconnection agreements.⁵ The PAP identifies variables to use for evaluating service quality, requires Qwest to measure and report on these variables, and prescribes payments that Qwest must make to CLECs when Qwest fails to meet the PAP’s standards. Generally Qwest can fulfill these standards by providing CLECs with the same level of quality that Qwest provides to its own retail customers.⁶
- *Minnesota Wholesale Service Quality Plan.* Notwithstanding Qwest’s objections, the Commission also adopted the Minnesota Wholesale Service Quality Plan (MN WHSQ

² See generally Laws of Minnesota 1995, chapter 156; Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code) (the federal Telecommunications Act of 1996).

³ 47 U.S.C. §§ 251(c), 252(a).

⁴ 27 U.S.C. § 271.

⁵ *In the Matter of Qwest’s Performance Assurance Plan*, Docket No. P-421/AM-01-1376, ORDER ADOPTING PLAN AND SETTING FURTHER PROCEDURAL SCHEDULE (July 29, 2002), ORDER ON RECONSIDERATION AMENDING PERFORMANCE ASSURANCE PLAN (November 26, 2002) and as revised on April 30, 2003.

⁶ See Federal Communications Commission Wireline Competition Bureau Docket No. 03-90 *In the Matter of Qwest Communications International, Inc. for Authorization to provide in-region, interLATA services in the State of Minnesota*, Application Appendix B (Statement of Generally Available Terms), Exhibit K; Appendix E. (See <http://www.qwest.com/wholesale/downloads/2004/041216/MN-SGAT-Exhibit-K-11-30-04.doc>)

Plan).⁷ Similar to the PAP, the MN WHSQ Plan identifies variables to use for evaluating service quality, requires Qwest to measure and report on these variables and prescribes payments that Qwest must make to CLECs when Qwest fails to meet the prescribed standards. In particular, the MN WHSQ Plan directs Qwest to make payments when Qwest fails to meet certain specified levels of quality (“benchmarks”) not included in the PAP. A CLEC could incorporate either the PAP or the MN WHSQ Plan into its interconnection agreement, but not both.

On February 17, 2004, the Commission granted in part Qwest’s request to partially suspend the implementation of the MN WHSQ standards pending judicial review.⁸ For each CLEC that adopted the MN WHSQ Plan, Qwest was to compensate the CLEC for any lapses in Qwest’s service quality as prescribed in the PAP. In addition, to the extent that the MN WHSQ Plan would have required a larger payment, Qwest was to calculate and report on this difference and deposit the sum into an escrow account until the courts had completed their review of the MN WHSQ Plan. The Commission would later allocate the escrow account balance “consistent with the outcome of judicial review.”⁹

Upon review, the Minnesota Supreme Court upheld the Commission’s authority to adopt the MN WHSQ Plan generally. But the Court concluded that the Commission lacked the authority to create an enforcement mechanism requiring Qwest, against its will, to make predetermined payments to CLECs when Qwest failed to comply with the Plan’s standards.

The parties now offer varying proposals about how to proceed.

II. POSITIONS OF THE PARTIES

The CLEC Coalition, Eschelon and Qwest all recommend that the Commission dissolve the escrow account and authorize Qwest to reclaim the funds.

Qwest acknowledges the Court’s finding that the Commission has authority to adopt wholesale service quality standards. Nevertheless, because all CLECs with whom Qwest interconnects have now adopted the PAP rather than the MN WHSQ Plan, Qwest argues that the MN WHSQ Plan should be retired as redundant. Alternatively, Qwest asks the Commission to re-evaluate the MN WHSQ Plan on the basis of the past three years of experience implementing it.

The CLEC Coalition and Eschelon ask the Commission to retain the MN WHSQ Plan and to require Qwest to continue reporting the extent to which its service quality fails to meet the MN

⁷ This docket, ORDER ADOPTING WHOLESALE SERVICE QUALITY STANDARDS (July 3, 2003).

⁸ This docket, ORDER ACCEPTING AFFIDAVIT AND ADOPTING PARTIAL STAY.

⁹ *Id.*

WHSQ Plan standards. They note that the courts found no fault with the Commission's authority to require Qwest to report to the Commission about the status of Qwest's service quality. Qwest, in contrast, argues that the Plan's reporting requirements were grounded in the Plan's payment scheme, and concludes that the Supreme Court's decision has undermined this rationale.

III. COMMISSION ACTION

Given the Minnesota Supreme Court's decision, the Commission finds merit in the recommendations of all of the parties to discontinue the MN WHSQ Plan escrow account. The account will be dissolved, with all the accumulated funds returned to Qwest.

However, the Commission will decline to repeal the MN WHSQ Plan. The Commission adopted the Plan to establish the minimum service standards to which CLECs are entitled. This fulfills the Commission's statutory mandate to ensure that rates bear a reasonable relationship to the services received,¹⁰ that competition for local telephone service is fair and reasonable,¹¹ that service quality is maintained and improved,¹² that customers have a choice among desirable alternatives,¹³ and that high quality telephone service is available throughout the state.¹⁴ Whatever the merits of the parity standard reflected in the PAP, it does not fulfill all these purposes. It does not ensure high quality, it is not competitively neutral, and it does not develop a competitive market.¹⁵

The fact that the PAP proves to be more popular among CLECs is not a reason for repealing the MN WHSQ Plan. While it is gratifying to observe that CLECs have access to an alternative that they currently prefer to this minimum standard, the Commission cannot know that they will continue to prefer this alternative in the future. Therefore the reasons for adopting the MN WHSQ Plan remain.

Similarly, the Commission will decline to eliminate the MN WHSQ Plan's reporting requirements. The Minnesota Supreme Court did not identify any fault with the Plan's reporting

¹⁰ Minn. Stat. § 237.011(2).

¹¹ Minn. Stat. §§ 237.011(4), 237.16, subd. 8(7).

¹² Minn. Stat. § 237.011(5).

¹³ Minn. Stat. § 237.011(6).

¹⁴ Minnesota Statutes § 237.16, subd. 8.

¹⁵ This docket, ORDER ADOPTING WHOLESALE SERVICE QUALITY STANDARDS at 18-20.

requirements or the Commission's authority to adopt them. The Commission will therefore continue to exercise this authority and require Qwest to report on the extent to which its wholesale services meet the MN WHSQ Plan's requirements in order to monitor the state of wholesale service quality.

ORDER

1. Qwest Corporation may dissolve the escrow account established pursuant to the Commission's ORDER ACCEPTING AFFIDAVIT AND ADOPTING PARTIAL STAY (February 17, 2004) and claim the funds contained therein.
2. The ORDER ADOPTING WHOLESALE SERVICE QUALITY STANDARDS (July 3, 2003) otherwise remains in effect. CLECs shall continue to have the option of adopting the Minnesota Wholesale Service Quality Plan into their interconnection agreements and Qwest shall continue reporting its performance on the provision of wholesale services under the MN WHSQ Plan's reporting requirements.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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